

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 CHARLES LINDEN and RONALD
9 LANDER,

10 Plaintiffs,

11 v.
12 X2 BIOSYSTEMS, INC., JOHN WU,
13 CHRISTOPHER SIEGE, and BRIAN
14 FLAIM

15 Defendants.

16 CASE NO. 2:17-cv-00966-RSM

17 **STIPULATED
18 PROTECTIVE ORDER**

19 1. PURPOSES AND LIMITATIONS

20 Discovery in this action is likely to involve production of confidential, proprietary, or
21 private information for which special protection may be warranted. Accordingly, the parties
22 (Plaintiffs Charles Linden and Ronald Lander, and Defendants X2 Biosystems, Inc. ("X2"), John
23 Wu, Christopher Siege, and Brian Flaim) hereby stipulate to and petition the court to enter the
24 following Stipulated Protective Order. The parties acknowledge that this agreement is consistent
25 with LCR 26(c). It does not confer blanket protection on all disclosures or responses to discovery,
the protection it affords from public disclosure and use extends only to the limited information or
items that are entitled to confidential treatment under the applicable legal principles, and it does
not presumptively entitle parties to file confidential information under seal.

1 This Order shall not retroactively apply to or include any materials or documents produced
2 prior to the entry of this Order.

3 2. **“CONFIDENTIAL” MATERIAL**

4 “Confidential” material shall include the following documents and tangible things
5 produced or otherwise exchanged that are expressly designated as “CONFIDENTIAL
6 MATERIAL” by (or at the request of) the party asserting the need for and applicability of such
7 designation: (1) financial information of the parties, except for information related to X2's
8 payment of wages and other employment benefits to the parties, and payments or loans made by
9 any of the Defendants to Plaintiffs, or to one another; (2) sensitive personnel information relating
10 to non-parties that X2 maintains as confidential within the company and does not disclose to third
11 parties in the ordinary course of business; namely, medical and health information, payroll and
12 benefits information that identify specific amounts of payroll and benefits information given to
13 specific individuals, tax records, disciplinary and performance-related records, formal and
14 informal performance appraisals, confidential settlements and confidential dispute resolutions with
15 former X2 employees, officers, and/or directors; (3) non-public proprietary information, such as
16 non-public intellectual property of X2; (4) non-public proprietary information of X2's customers
17 or prospective customers, which may include non-public intellectual property.

18 3. **SCOPE**

19 The protections conferred by this agreement cover not only confidential material (as
20 defined above), but also (1) any information copied or extracted from confidential material; (2) all
21 copies, excerpts, summaries, or compilations of confidential material; (3) written discovery or
22 informal discovery that contains confidential information; and (4) any testimony, conversations,
23 or presentations by parties or their counsel that might reveal confidential material.

24 However, the protections conferred by this agreement do not cover information that is in
25 the public domain or becomes part of the public domain through trial or otherwise.

26

1 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

2 4.1 Basic Principles. A receiving party may use confidential material that is disclosed
3 or produced by another party or by a non-party in connection with this case only for prosecuting,
4 defending, or attempting to settle this litigation. Confidential material may be disclosed only to the
5 categories of persons and under the conditions described in this agreement. Confidential material
6 must be stored and maintained by a receiving party at a location and in a secure manner that ensures
7 that access is limited to the persons authorized under this agreement.

8 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered
9 by the court or permitted in writing by the designating party, a receiving party may disclose any
10 confidential material only to:

11 (a) the named parties in this matter, including the receiving party’s counsel of
12 record in this action, as well as employees of counsel to whom it is reasonably necessary to disclose
13 the information for this litigation;

14 (b) the officers, directors, and employees (including in house counsel) of the
15 receiving party to whom disclosure is reasonably necessary for this litigation, unless the parties
16 agree that a particular document or material produced is for Attorney’s Eyes Only and is so
17 designated;

18 (c) experts and consultants to whom disclosure is reasonably necessary for this
19 litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

20 (d) the court, court personnel, and court reporters and their staff;

21 (e) copy or imaging services retained by counsel to assist in the duplication of
22 confidential material, provided that counsel for the party retaining the copy or imaging service
23 instructs the service not to disclose any confidential material to third parties and to immediately
24 return all originals and copies of any confidential material;

25 (f) during their depositions, witnesses in the action to whom disclosure is
26 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”

1 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
2 transcribed deposition testimony or exhibits to depositions that reveal confidential material must
3 be separately bound by the court reporter and may not be disclosed to anyone except as permitted
4 under this agreement;

5 (g) the author or recipient of a document containing the information or a
6 custodian or other person who otherwise possessed or knew the information.

7 4.3 Filing Confidential Material. Before filing confidential material or discussing or
8 referencing such material in court filings, the filing party shall confer with the designating party
9 to determine whether the designating party will remove the confidential designation, whether the
10 document can be redacted, or whether a motion to seal or stipulation and proposed order is
11 warranted. Local Civil Rule 5(g) sets forth the procedures that must be followed and the standards
12 that will be applied when a party seeks permission from the court to file material under seal.

13 5. DESIGNATING PROTECTED MATERIAL

14 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party
15 or non-party that designates information or items for protection under this agreement must take
16 care to limit any such designation to specific material that qualifies under the appropriate
17 standards. The designating party must designate for protection only those parts of material,
18 documents, items, or oral or written communications that qualify, so that other portions of the
19 material, documents, items, or communications for which protection is not warranted are not swept
20 unjustifiably within the ambit of this agreement.

21 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
22 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
23 unnecessarily encumber or delay the case development process or to impose unnecessary expenses
24 and burdens on other parties) expose the designating party to sanctions.

25
26

1 If it comes to a designating party's attention that information or items that it designated for
2 protection do not qualify for protection, the designating party must promptly notify all other parties
3 that it is withdrawing the mistaken designation.

4 5.2 Manner and Timing of Designations. Except as otherwise provided in this
5 agreement, or as otherwise stipulated or ordered, disclosure or discovery material that qualifies for
6 protection under this agreement must be clearly so designated before or when the material is
7 disclosed or produced.

8 (a) Information in documentary form: (e.g., paper or electronic documents and
9 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings),
10 the designating party must affix the word "CONFIDENTIAL" to each page that contains
11 confidential material. If only a portion or portions of the material on a page qualifies for protection,
12 the producing party also must clearly identify the protected portion(s) (e.g., by making appropriate
13 markings in the margins). Native format document production will be designated confidential by
14 adding the word "CONFIDENTIAL" to the file name of the native format document produced, or
15 by affixing the word "CONFIDENTIAL" to the label of the media on which the native format
16 documents are produced as per section 5.2(c) below.

17 (b) Testimony given in deposition or in other pretrial proceedings: the parties
18 and any participating non-parties must identify on the record, during the deposition or other pretrial
19 proceeding, all protected testimony, without prejudice to their right to so designate other testimony
20 after reviewing the transcript. Any party or non-party may, within fifteen days after receiving the
21 transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or
22 exhibits thereto, as confidential. If a party or non-party desires to protect confidential information
23 at trial, the issue should be addressed during the pre-trial conference.

24 (c) Other tangible items: the producing party must affix in a prominent place
25 on the exterior of the container or containers in which the information or item is stored the word
26

1 "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection,
2 the producing party, to the extent practicable, shall identify the protected portion(s).

3 (d) Written discovery: Written discovery may be designated confidential by
4 affixing the word "CONFIDENTIAL" to each page of the discovery response that contains
5 confidential information.

6 (e) All confidential information not reduced to documentary or tangible form
7 or which cannot be conveniently designated as set forth above, shall be designated by the
8 producing party informing the receiving party of the designation in writing.

9 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
10 designate qualified information or items does not, standing alone, waive the designating party's
11 right to secure protection under this agreement for such material. Upon timely correction of a
12 designation, the receiving party must make reasonable efforts to ensure that the material is treated
13 in accordance with the provisions of this agreement.

14 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

15 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
16 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality
17 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
18 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
19 challenge a confidentiality designation by electing not to mount a challenge promptly after the
20 original designation is disclosed.

21 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
22 regarding confidential designations without court involvement. Any motion regarding confidential
23 designations or for a protective order must include a certification, in the motion or in a declaration
24 or affidavit, that the movant has engaged in a good faith meet and confer conference with other
25 affected parties in an effort to resolve the dispute without court action. The certification must list
26

1 the date, manner, and participants to the conference. A good faith effort to confer requires a face-
2 to-face meeting or a telephone conference.

3 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
4 intervention, the designating party may file and serve a motion to retain confidentiality under Local
5 Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
6 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those
7 made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on
8 other parties) may expose the challenging party to sanctions. All parties shall continue to maintain
9 the material in question as confidential until the court rules on the challenge.

10 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
11 LITIGATION

12 If a party is served with a subpoena or a court order issued in other litigation that compels
13 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that party
14 must:

15 (a) promptly notify the designating party in writing and include a copy of the
16 subpoena or court order;

17 (b) promptly notify in writing the party who caused the subpoena or order to
18 issue in the other litigation that some or all of the material covered by the subpoena or order is
19 subject to this agreement. Such notification shall include a copy of this agreement; and

20 (c) cooperate with respect to all reasonable procedures sought to be pursued by
21 the designating party whose confidential material may be affected.

22 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

23 If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential
24 material to any person or in any circumstance not authorized under this agreement, the receiving
25 party must immediately (a) notify in writing the designating party of the unauthorized disclosures,
26 (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the

1 person or persons to whom unauthorized disclosures were made of all the terms of this agreement,
2 and (d) request that such person or persons execute the "Acknowledgment and Agreement to Be
3 Bound" that is attached hereto as Exhibit A.

4 **9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED**
5 **MATERIAL**

6 9.1 When a producing party gives notice to receiving parties that certain inadvertently
7 produced material is subject to a claim of privilege or other protection, the obligations of the
8 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision
9 is not intended to modify whatever procedure may be established in an e-discovery order or
10 agreement that provides for production without prior privilege review. The parties agree to the
11 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

12 9.2 Pursuant to Federal Rule of Evidence 502(b), inadvertent production of documents
13 subject to work-product immunity, the attorney-client privilege, or other legal privilege protecting
14 information from discovery shall not constitute a waiver of the immunity or privilege.

15 9.3 Inadvertent production does not include any materials or documents produced prior
16 to the entry of this Order.

17 **10. NON TERMINATION AND RETURN OF DOCUMENTS**

18 Within 60 days after the termination of this action, including all appeals, each receiving
19 party must return all confidential material to the producing party, including all copies, extracts and
20 summaries thereof. Alternatively, the parties may agree upon appropriate methods of destruction.

21 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
22 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
23 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work
24 product, even if such materials contain confidential material. Any such confidential materials shall
25 not be used for any non-archival purpose.

1 The confidentiality obligations imposed by this agreement shall remain in effect until a
2 designating party agrees otherwise in writing or a court orders otherwise.
3

4 PURSUANT TO STIPULATION, IT IS SO ORDERED

5 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
6 documents in this proceeding shall not, for the purposes of this proceeding or any other proceeding
7 in any other court, constitute a waiver by the producing party of any privilege applicable to those
8 documents, including the attorney-client privilege, attorney work-product protection, or any other
9 privilege or protection recognized by law.

10 Dated this 1 day of the March 2018

11
12 

13 RICARDO S. MARTINEZ
14 CHIEF UNITED STATES DISTRICT JUDGE

15 Presented by:

16 By: s/ Christie J. Fix
17 Christie J. Fix, WSBA #. 40801
18 FRANK FREED SUBIT & THOMAS LLP
19 705 Second Avenue, Suite 1200
20 Seattle, Washington 98104-1798
21 (206) 682-6711
22 (206) 682-0401 fax
23 cfix@frankfreed.com

24 By: s/ Michelle Safro
25 Michelle Safro (*admitted pro hac vice*)
26 REMENICK PLLC
27 1025 Thomas Jefferson Street, NW
28 Suite 175
29 Washington, DC 20007
30 (202) 570-7380
31 (888) 570-7381 fax

1 msafro@remenicklaw.com

2 *Attorneys for Plaintiffs Charles Linden and
Ronald Lander*

3 By: s/ Kenneth J. Diamond

4 Kenneth J. Diamond, WSBA # 27009

5 Winterbauer & Diamond, PLLC

6 1200 Fifth Avenue, Suite 1700

7 Seattle, Washington 98101

(206) 676-8440

7 mail@winterbauerdiamond.com

8 By: s/ Michael R. Gordon

9 Michael R. Gordon (*admitted pro hac vice*)

10 Jay, J. Schecter (*admitted pro hac vice*)

GordonLaw LLP

11 51 Bedford Road, Suite 10

12 Katonah, New York 10536

13 200 Park Avenue, Suite 1700

14 New York, New York 10166

15 (914) 232-9500

16 (914) 992-6634 fax

mgordon@gordonlawllp.com

jschecter@gordonlawllp.com

17 *Attorney for Defendants X2 Biosystems, Inc., John Wu, Brian Flaim, and Christopher Siege*

18

19

20

21

22

23

24

25

26

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Western District of Washington on [date] in the case of *Linden, et al., v. X2 Biosystems, Inc., et al.* (Case No. 2:17-cv-00966-RSM). I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date:

City and State where sworn and signed:

Printed name:

Signature: